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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-803

HERMAN LEBLANC,
Petitioner

versus

CARDWELL MANUFACTURING CO.,
Respondent

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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I N D E X

	PAGE
Statement of Issues----------	1
Statement of the Case----------	2
Statement of Facts----------	4
Argument----------	4
Conclusion----------	14
Certificate of Service----------	16

LIST OF AUTHORITIES

CASE	PAGE
88 C.J.S. (Trial) Sec. 208 p. 408 et. seq. 276, p. 737 et. seq.------	7

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Petitioner, HERMAN LEBLANC, prays that a writ of certiorari issue herein to review the judgment and decree of the United States Court of Appeals for the Fifth Circuit, affirming the granting of a directed verdict by the United States District Court for the Eastern District of Louisiana.

OPINIONS BELOW

Except for the Trial Court's observations during the argument upon defendant's motion for a directed verdict, no opinion was rendered either by the Trial Court of the Court of Appeals.

JURISDICTION

Original jurisdiction in this case is predicated upon diversity of citizenship.

STATEMENT OF CASE

Petitioner is an oil field worker, and, on April 24, 1969, was employed as a roustabout by U. S. Oil of La. aboard a land-based sulphur drilling rig in Southern Louisiana, which was manufactured by defendant Cardwell. It was mounted approximately five feet from ground level on a carrier that resembled a large flat-bed tractor-trailer unit, and, thus self contained, was transported from place to place. The rig's derrick was in two sections, with an upper truss-like unit fitting inside a lower truss-like unit. During transport, the units are in a horizontal position across the bed of the truck. Upon arriving at a new drilling location, the truss-like units, nested together, are raised into a vertical position by hydraulic rams. A separate mechanism, in this case Tulsa Model 19 winch manufactured by a subsidiary of the defendant Sperry-Rand, raises the inner, upper section into place by means of wire rope. The mechanism which raises this section is equipped with a safety device in the form of "dogs" designed to grip the vertical legs of the truss-like sections if tension upon the cables is relaxed.1/

On the day of the accident, the rig had

1/See plaintiff's exhibit 1 & 2(A) for complete schematic diagrams. The exact component parts of the winch appear on the third sheet of exhibit 2.

just arrived at a new site, and the crew - of which petitioner was a member, was in the process of setting up the rig at the new location. The sections had been elevated to the vertical without mishap, and the driller then proceeded to raise the upper section in accordance with standard procedures. This upper section had been hoisted almost into position when the driller sensed that mechanical difficulties had developed. He stopped his raising operation, and called the tool pusher (overall supervisor), who attempted to complete the raising. Before he could get the upper section completely elevated and locked in place, this section came crashing down, forcing all hands including petitioner, to jump from the bed of the truck. Petitioner sustained serious injuries to his ankle.

A post-accident investigation revealed that certain gears in the power transfer section of the Sperry-Rand winch had stripped. For the Court's reference, this power train is composed of a spiral gear called a "worm" and a ring gear. The former had failed, thus permitting the upper section of the drilling rig to fall.

At no time during the fall of the upper section did the cable break; thus the "dogs" were never actuated to permit them to in any way impede the collapse of the rig.2/

2/The second and third page of plaintiff's exhibit 2 are a projected schematic of the rig with an inset designed to illustrate the position and functioning of the "dogs" or safety catches. The latter appears upper right on both pages.

Travelers Insurance Company is U. S. Oil of La.'s workmen's compensation carrier and has intervened for compensation and medical expense paid to petitioner or on his behalf.

REASONS FOR GRANTING THIS PETITION

(1) As the facts set forth in petitioner's argument will illustrate, the granting of a directed verdict in this case was unprecedented.

(2) The affirmance per curiam and without an opinion constitutes part of a recent policy on the part of the Fifth Circuit Court of Appeals that is alarming and threatens the right of trial by jury and the full appellate review guaranteed by the constitution of the United States and the rules of this Honorable Court.

ARGUMENT

The evidence, and especially the testimony of the respective experts who were called by the plaintiff and defendant, was in complete and sharp contrast. However, since this involves the granting of a directed verdict, testimony that would have contradicted that favorable to the plaintiff is completely irrelevant. We believe that the rules governing the granting of a directed verdict are too well known to require citation of authority and, if a conflict of fact did indeed exist, this would have to be resolved by the jury, not the trial Judge. Plaintiff's expert testified in substance as follows:

The orthodox or standard model of winch uses a clutch-type mechanism to directly transfer power from the power source to the gear train. The winch here at issue had been especially designed for Cardwell, and uses a keyed shaft instead of a clutch, so that there was no way to disengage the power train. This is germane when the only safety device designed into the rig is considered. These are the "dogs" that would hold the upper section in place in the event of a broken or skipped cable. As designed, the "dogs" are not activated until and unless tension leaves the line. Had the winch been equipped with a clutch, upon the gears being stripped, tension would have left the line and the safety devices could have come into play. The use of the keyed shaft prevented this release of tension, because, unlike a clutch, this type of power transmission will not "kick out". Tension remains on the line at all times, and the safety clasps or "dogs" will not function. Petitioner's expert was quite positive in stating that, in his opinion, this was an extremely poor design and materially contributed to the accident. (App. p. 5-7, 15-27). The Chief engineers of both Cardwell Manufacturing Company and Sperry-Rand admitted that gears do strip, but they both also conceded that- in the instance of this particular design - there was no alternative safety device provided to prevent the type of accident which occurred here, upon the stripping of the gears themselves. (App. pp 116-117, 140, 141, 144, 164, 165).

Petitioner's expert witness, and the

chief engineers of both Cardwell Manufacturing Company and Sperry-Rand, Tulsa Division, testified prior to the petitioner resting his case. At that time, the defense moved to dismiss, which motion was denied.

At this point, the trial court said:

> ALL RIGHT, LET ME ASK YOU, AT THIS POINT, COULDN'T A RATIONAL MAN IN THE JURY BOX ASSUME THAT THE PLAINTIFF HAS SHOWN TO THEIR SATISFACTION THAT THE MAINTENANCE WAS ADEQUATE, THAT THE OILING WAS ADEQUATE, THAT THE CARE WAS ADEQUATE AND THAT THE USE WAS REASONABLE, COULDN'T A JUROR, YOU SEE YOU KNOW WHAT I MEAN, COUNSEL. (App. - 187) (Emphasis suppled)

As their sole and only defense, Cardwell Manufacturing Company called one Neely (Spelled Neillie in the transcript) Woodruff who had been employed by Cardwell for many years as their maintenance mechanic. He testified that he had been employed by Cardwell to service and repair their drilling rigs, being on their payroll until they discontinued their service department. (App. 194). After he had left their direct employ, he continued to service and repair Cardwell rigs for Cardwell customers. Mr. Woodruff's testimony was factual to the extent that he had found the teeth of the worm gear completely stripped off when he opened the gear box. He also testified that the gears had been greatly worn prior to their breaking. In his opinion, the failure was due entirely to a lack of lubrication.

Based entirely upon its evaluation of the testimony of this witness, the Court granted the defendant's motion for a directed

verdict. It is not necessary to search for the trial court's motivation. It was detailed in observations from the Bench made during the argument for the directed verdict. At page 257 of the trial transcript, the trial Judge stated:

> "But, I will be frank with you, I think that Mr. Woodruff's testimony is the most OVERWHELMING, CONVINCING, CREDIBLE EVIDENCE THAT I'VE EVER HEARD... IN A COURTROOM. I thought he was one of the best witnesses and I THINK HE WAS COMPLETELY CREDIBLE AND I THINK HE WAS COMPLETELY RELIABLE." (Emphasis Supplied).

At pages 257 and 258, the Court further stated:

> "However, based on the only fact witness, the condition of the teeth of the gears, is MR. WOODRUFF, WHOSE CREDIBILITY IS OVERWHELMING..." (Emphasis Supplied).

Petitioner submits that there is probably no more firmly fixed principal of law governing jury trials than that the credibility of a witness and the weight to be given his testimony are entirely the function of the jury, and not that of the trial Judge. Precisely, this is the jury's gravest responsibility; its primary function. This is "Hornbook Law" 88 C.J.S. (trial) Sec. 208 p. 408 et seq. 276, p. 737 et seq.

The trial judge may have had the right to believe that every word of Mr. Woodruff uttered was of the most momentous import, but the jury was not compelled to so believe. They may well have considered that:

(1) Neely Woodruff had been a lifelong

. . . . . employee of defendant Cardwell, and there would be always the distinct possibility that he would have a definite bias in their favor. (App. 194). In fact, Mr. Woodruff used the pronoun "we" when referring to Cardwell. (App. 199).

(2) Mr. Louis Montre was the chief engineer for Cardwell and had been since 1946. As such, he would have been one of Mr. Woodruff's superiors. They jury could have presumed that Mr. Woodruff would be entirely in agreement with the views of his long time commander in chief.

(3) Woodruff testified that there was a total lack of lubrication in the gear box, but Norris Andras testified that the crew followed a regular "greasing up" program (App. p. 83). As a witness who was completely disinterested in the outcome of this litigation and without the residual loyalty imputable to Neely Woodruff, it is entirely possible - if not probable - that the jury would have discounted Mr. Woodruff's testimony in this instance.

(4) Woodruff testified that when he examined the rig, the safety catches were inoperable. (App. 226, 227). However, when he was later asked to enumerate the work that he did to restore the rig, he failed to list repairing this part of the apparatus, which would have been a major undertaking! App. 244. It was only on cross-examination,

when this oversight was pointed out to him, that he "recalled" having made a charge for this service. (App. 247).

(5) Mr. Woodruff's testimony that the safety catches were inoperable is contradicted by the testimony of the men at the site at the time, to the effect that at least one of these catches did attempt to hold the rig in position. (App. 57-59, 69-70).

(6) The chief Engineers of both Cardwell Manufacturing Company and Tulsa Division of Sperry-Rand, admitted that gears wear out - just as the gears in this instance. (App. 142-143, 159-160). There was no safety device available on this rig to prevent the type of failure that occurred here, with its concommitant injuries. (App. 144).

Certainly the jury would have had the right to completely believe the testimony of plaintiff's expert (to the effect that a clutch would have permitted the safety devices to come into play and hold the top section in place), and they would have had the equivalent right to completely disbelieve this testimony. By the same token, they would have had the right to weigh the experiences and the testimony of all of the witnesses in context. Considering the factual evidence as a whole, petitioner respectfully submits that the directing of a verdict in this case was a clear and patent usurpation by the trial court of the function of the jury.

It would seem apparent that, if trial

judges are permitted to direct verdicts . . . . . anytime they believe one witness over another or when they believe that the testimony of a particular witness should be entitled to greater weight than that of another, the right of trial by jury would become an empty formality. The only time a case need be submitted to a jury would be when the trial court considered that the jury would arrive at the same conclusion as the Court, would give the same weight to the evidence, and would consider credibility of witnesses identically in the manner in which the Court would. In this instance, the trial Judge was not sitting as the trier of fact. He seemed to recognize that a jury would not necessarily reach the same result he did;

> "I think that the jury verdict, if it were to come back the other way, would just be completely wrong." (At page 258).

THE FIFTH CIRCUIT COURT OF APPEALS AFFIRMANCE PER CURIAM AND WITHOUT OPINION SHOULD NOT BE PERMITTED TO STAND.

The practice of screening that has been initiated by the Fifth Circuit Court of Appeals, since December 15, 1968, is of most urgent import here.

As practising attorneys, we can understand, and we full sympathize with, the desire of our Appellate Court to deal expeditiously with its case load. However, while this practice on the part of the Fifth Circuit Court of A ppeals may have resulted in disposing of more cases, there is serious question whether the quality of the justice rendered under these circumstances has not been seriously impaired. There seems to have been an unfortunate tendency to emphasize

reducing case loads, or the docket, with a seeming sacrifice in the time and the attention given to the issues presented by the cases at bar.

No doubt all Circuit Courts of Appeals (as well as State Courts and all other Federal Courts nationwide) labor under a heavy case load. "Screening", like any type of "short-cut", will certainly result in disposing of more cases. But, like so many similar things, while screening and summary dispositions have their advantages, they also have some very grave and fundamental disadvantages - so grave that there is a serious question that the quality of justice is screened, merely to permit the quantity of justice to be increased. In screening, it seems that we are closing the courthouse door as the answer to overworked judges and overcrowded dockets. This procedure, and the concomitant curtailment of oral argument, certainly do not comply with the admonition that it is not only important that justice be done, but also that justice appear to have been done.

Excerpts from a paper given by the Hon. Samuel C. Gainsburgh, before the "Commission on Revision of the Federal Court Appellate System" on August 22, 1973, are here reproduced as being especially apropos to the discussion. These excerpts set forth various statistics and comparisons which seem to indicate that there has been a tendency to place reducing the case-load or docket ahead of all else.

> "...(T)o the lawyer whose case is on appeal as well as to his client, it is of utmost importance that he know his client's position will be given full

. . . and fair consideration. . . . . .

"Trial courts, it has been said, search for truth; appellate courts search for error. Error, for all practical purposes, means that the trial court's judgment will not be affirmed. It will be reversed or at least modified. These are my statistics bearing, I feel, on the question of whether the court's search for error is as diligent with screening as it was before this practice was instituted:

Year(FY)	No. of Judges	No. of Cases Judged	%Reversed
1963-64	7	828	29.5
1964-65	7	716	25.1
1965-66	9	886	24.7
1966-67	12	970	25.3
1967-68	13	1089	25.5
1968-69*	12	1279	24.8
1969-70**	15	1427	24.1
1970-71	15	1812	19.5
1971-72	15	2025	14.9
1972-73	15	2167	15.6

* Six months of "Screening"
** First Full Year of "Screening"

"...(Various) tables and charts will reveal that there has been no major change in the subject matter of the appeals during the period covered by (the) table of statistics.

"From the Court's statistics, you know that, as of the immediate past fiscal year, Fifty-seven per cent of all of appellants did not get a hearing of any kind insofar as oral argument goes.

> Of that percentage, thirty-three percent did not even know why their appeals failed because they received "Rule 21" treatment and not even a per curiam opinion.
>
> "But more significantly, as (the) table reflects, the average number of successful appeals for the two years before screening began was slightly more than one out of four; whereas, for the last two years with screening in full swing, the appellants' average rate of success is down to about one out of six. For the sake of convenience if we used twenty-five percent for the pre-screening years mentioned and fifteen percent for the two current screening years, the plain mathematical result is that our judges are able to discern forty percent less error when they look at appeals through a screen than when they are examining them in the light of oral argument and post-argument face-to-face conferences."

General statistics seem to indicate that sixty percent of all cases are placed upon the summary calendar, and these almost invariably result in per curiam affirmances without opinion. In these instances, members of the trial bar find themselves in the position where they cannot even explain to the client why he lost his case.

In the case at bar, we believe factual issues were presented.

We believe that the trial court was in error in denying to the plaintiff the right to a jury trial on these issues.

We believe that the trial court

committed error in taking the decision in the cause away from the jury and appropriating this decision to itself:

We believe that the trial court committed error in giving greater weight to the testimony of one witness over another.

We believe that the trial court committed error in interpreting the testimony given by this witness in a fashion completely at variance with the standards for directed verdicts.

Because we believe the trial court committed error, and because we believe that these errors were fundamental to the right of a jury trial, we ask the Fifth Circuit Court of Appeals for a review of the trial court's holdings.

Because the trial court "screened" this case, and it was placed on the summary docket, none of the parties - nor their attorneys - have any way of knowing the limitations of the appellate court's decision.

Was the trial court correct in denying that there was a factual issue? If so, an opinion of some sort must be rendered so that other attorneys may better learn to interpret what is a factual issue.

Was the trial court correct in denying plaintiff the right to a jury trial on these issues? If so, an opinion must be published so that attorneys may know that there is a limitation on the right to a trial by jury, and what this limitation is.

Was the trial court correct in taking the decision in this cause away from the

jury, and appropriating this decision to itself? If so, guidelines must be established through a published opinion, so that attorneys have a guide for their future argument.

Was the trial court correct in the weight that it gave to various of the witnesses, as opposed to other witnesses? If so, an opinion is a necessity, so that attorneys may know what emphasis to place on the evidence being presented.

Was the appellate court correct in its summary treatment of this cause? If so, a published opinion is of prime importance, to prevent appeals of this nature from being considered a frivolous hereafter.

If the appellate court believes, and believed, that the cause did not present a justiciable issue sufficient to require a full dress oral argument, at least the reason for their decision should be made known, as a guide to other attorneys in preparing and presenting their written briefs.

But a summary per curiam decision, without opinion, should not be permitted to stand.

Respectfully submitted,

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BY: _____
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CERTIFICATE OF SERVICE

I hereby certify that copies of the Petition for a Writ of Certiorari , have been served upon the opposing counsel, this 19th day of November ,1973.

_____